The Daily News of Los Angeles, a Division of Cooke Media Group, Inc. *and* Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL–CIO. Case 31–CA–17751

December 30, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, AND COHEN

On August 27, 1991, the National Labor Relations Board issued its Decision and Order in this proceeding finding, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by unilaterally withholding annual merit wage increases from employees during negotiations with the Union for an initial contract.[1] In finding the violation, the Board relied on the Supreme Court's decision in *NLRB v. Katz*[2] and the Board's decision in *Oneita Knitting Mills*[3] to conclude that where, as here, the Respondent maintained an established practice of granting merit raises that were fixed as to timing but discretionary in amount, it was precluded from discontinuing that practice without bargaining to agreement or impasse with the Union.

Thereafter, the Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit. On December 11, 1992, the court issued a decision which found that the Board's holding prohibiting the discontinuance of annual merit increases that were discretionary in amount was inconsistent with Board precedent and was ''by no means compelled by the logic of *Katz*.''[4] The Court stated that although *Katz* ''stand[s] for the proposition that an employer may not unilaterally *continue* discretionary increases,''[5] the ''opinion said not a word about *discontinuance* of a past pattern of discretionary wage increases, and . . . the Board here offered no explanation of the extension.''[6] Accordingly, the court remanded the case to the Board to reconcile the conflict with its precedent on this issue and ''for consideration of whether an employer is bound under *Katz* to persist in a merit raise program that is entirely discretionary as to amount.''[7]

On April 9, 1993, the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position. Thereafter, all parties filed statements of position.

Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the Board's finding regarding the unlawful discontinuance of the discretionary merit raise practice is not compelled by *Katz*. Nevertheless, upon reconsideration in light of the court's opinion and the parties' statements of position, the Board has decided for the reasons stated below to reaffirm its finding of a violation on the basis that a reasonable interpretation of *Katz* supports the conclusion that the Respondent violated the Act.

Discussion

The facts pertaining to the Respondent's merit review program are undisputed. Briefly stated, since 1986 when the Respondent took over the newspaper operations of its predecessor, it continued an existing practice of annually evaluating the performance of all its employees—the editorial department employees at issue here as well as the unrepresented employees. The performance appraisals were regularly given at the time of the employees' employment anniversaries and resulted in wage raises of between 3 and 5 percent generally for those who received them.[8] The raises were based on merit and the amount of each raise was determined solely by the Respondent in its discretion. In short, the Respondent's overall review program consisted of appraising every employee once a year, considering each employee for a merit wage increase, and granting a merit increase to at least 80 percent of the employees.[9]

After the Union was certified as the bargaining representative of the editorial employees and negotiations commenced for a contract, the Respondent continued to evaluate all of its employees annually and to grant merit increases to its unrepresented employees. It discontinued, however, granting merit increases to the editorial department employees.

Notwithstanding the element of discretion retained by the Respondent in setting the amount of merit raises, the Board found, and we do not understand the court as disagreeing, that the merit review program was an established practice and a term and condition of employment regularly expected by the employees.[10]

[1] 304 NLRB 511.

[2] 369 U.S. 736 (1962).

[3] 205 NLRB 500 (1973).

[4] *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1573 (D.C. Cir. 1992).

[5] Id. at 1574.

[6] Id. at 1573.

[7] Id. at 1576.

[8] A small minority (fewer than 10 percent) received increases in amounts ranging from 12 to 40 percent.

[9] The Respondent denied merit increases to 18.5 percent of the unit employees in 1986 and to 17.3 percent in 1987.

[10] Accordingly, we disagree with the characterization of the merit increase program in the instant case by the 10th Circuit in its recent decision in *Phelps Dodge Mining Co. v. NLRB*, 17 F.3d 1334 (1994), as not constituting a term and condition of employment. Nothing in the D.C. Circuit's decision in this case suggests that the court disagreed with the Board's finding in this regard. To the contrary, that court reversed and remanded this case to the Board for a reanalysis of our decision under *Katz*, an analysis which, as the *Phelps Dodge* court acknowledges, applies only to subjects which constitute terms and conditions of employment within the meaning

This finding provides the starting point for analyzing the primary question presented to us by the court: whether the Respondent, during contract negotiations with the Union, was privileged under *Katz* to discontinue an established condition of employment in which all unit employees were annually considered for, and a vast majority were awarded, merit increases.

I. THE KATZ ISSUE

A. *Unilateral Conduct Which Effectuates a Change in a Mandatory Term and Condition of Employment is Prohibited by Katz*

The Board and the court agreed in this case that the starting point for discussion is the Supreme Court's decision in *Katz*.

In *Katz*, the employer, during negotiations for an initial contract and without notification to or bargaining with the union, put into effect a new sick leave plan and granted across-the-board wage increases and discretionary merit increases to a selected number of employees. The Court, equating this conduct with a literal refusal ''even to negotiate *in fact*—'to meet . . . and confer'—about any of the mandatory subjects,'' stated that the employer's unilateral action violated Section 8(a)(5) ''for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.'' 369 U.S. at 743. The Court went on to explain:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. [Id. at 747.]

Indeed, the Court viewed unilateral conduct so pernicious to the collective-bargaining process that it held that a showing of subjective bad faith on the employer's part is unnecessary to establish a violation.

Although the court's opinion in this case suggests that the holding of *Katz* is limited by its facts, i.e., the unilateral *continuance* of a merit wage program, neither the Board nor courts have given such a narrow reading to *Katz* in subsequent decisions. Thus, the Board and courts have applied *Katz* to enjoin unilateral conduct by employers in a wide variety of contexts, including the prohibition of a unilateral *discontinuance* of an employer practice of providing employees with coffee and rolls and permitting them to smoke in a warehouse;[11] the prohibition of an employer's unilateral *discontinuance* of a hiring hall arrangement;[12] the prohibition of a unilateral *decrease* from 1 hour to 15 minutes of paid free time for employees working double shifts, the unilateral *alteration* of a method to compute holiday pay, and the unilateral *modification* in the model of respirators to be worn by employees;[13] the prohibition of a unilateral *substitution* of one insurance plan for another;[14] the prohibition of a unilateral *modification* of a policy governing the right of taxi drivers to take their cabs home at night;[15] the prohibition of a unilateral *increase* in hourly shift schedules, a unilateral *increase* in health insurance premiums to be paid by employees, and a unilateral *decrease* in bus service provided to employees;[16] and the prohibition of a unilateral implementation of an economic layoff.[17] See also John H. McGuckin, Jr., *Clipping the Fringes: An Employer's Duty to Bargain Prior to Unilaterally Changing Employee Benefits*, 10 U.S. F. L. Rev. 175 (1975) (reviewing *Katz*' application to unlawful *discontinuances* of Christmas bonuses).

In none of these cases was it determinative whether a continuance or a discontinuance, or an increase or a decrease, or an alteration or modification of a condition of employment had been effectuated. Rather, each of the unilateral acts was struck down on the authority of *Katz* because a condition of employment had been unilaterally *changed*. As stated by the Fifth Circuit in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970):

> The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
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> . . . .
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> In other words, whenever the employer by promises or by a course of conduct has made a

of Sec. 8(d) of the Act. See, e.g., *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981), where the court noted that ''[i]ndefiniteness as to amount and a flavor of discretion do not . . . prevent [merit raises] from becoming part of the conditions of employment.''

[11] *Chemtronics Inc*., 236 NLRB 178, 190 (1978).

[12] *Southwestern Steel Inc*., 806 F.2d 1111, 1113 (D.C. Cir. 1986), enfg. 276 NLRB 1569 (1985); *Sheeran v. American Commercial Lines*, 683 F.2d 970, 977 (6th Cir. 1982).

[13] *J. P. Stevens & Co. v. NLRB*, 623 F.2d 323 (4th Cir. 1980), enfg. in part 239 NLRB 738 (1978).

[14] *Oil, Chemical & Atomic Workers (Kansas Refined Helium) v. NLRB*, 547 F.2d 575 (D.C. Cir 1976); *Bastian-Blessing v. NLRB*, 474 F.2d 49, 53 (6th Cir. 1973), enfg. 194 NLRB 609 (1971).

[15] *Seafarers Local 777 v. NLRB*, 603 F.2d 862, 888–890 (D.C. Cir. 1978), enfg. in part 229 NLRB 1329 (1977); see also *Wil-Kil Pest Control Co. v. NLRB*, 440 F.2d 371, 374–375 (7th Cir. 1971) (same regarding use of company car).

[16] *Millard Processing Services*, 310 NLRB 421 (1993).

[17] *Garment Workers Local 512 (Felbro, Inc.) v. NLRB*, 795 F.2d 705, 710–712 (9th Cir. 1986), enfg. 274 NLRB 1268 (1985), citing *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981) (unilateral *discontinuance* of pension fund contributions violates Sec. 8(a)(5)).

> particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during . . . bargaining. In those cases where the employer was found guilty of an unfair labor practice for withholding benefits during . . . the process of collective bargaining, the basis of the charge was a finding that the employer has changed the established structure of compensation. [Emphasis in the original.][18]

In our view, the standard set forth in *Dothan Eagle*, which looks to whether a *change* has been implemented in conditions of employment, captures best what lies at the heart of the *Katz* doctrine. It neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

B. *The D.C. Circuit and Other Courts have Applied Katz in Concluding that Unilateral Changes Resulting in Discontinuance of Merit Raises Violate the Act*

In *NLRB v. Allied Products Corp.*,[19] the employer unilaterally discontinued merit increases which, like here, were fixed as to timing but discretionary in amount. With reasoning almost identical to the standard set forth in *Dothan Eagle*, the Sixth Circuit explained:

> The Act is violated by a unilateral *change* in the existing wage structure whether that change be an increase or the denial of a scheduled increase. Because the Company unilaterally *changed* an existing condition of employment, instead of maintaining the status quo, the Board properly found that it had committed an unfair labor practice. [Id. at 653, emphasis in the original.]

Similarly, the Eighth Circuit has affirmed the Board's finding that the discontinuance of merit increases violated Section 8(a)(5). In *Litton Microwave Cooking Products v. NLRB*,[20] the employer had a practice of granting employees a merit increase every February since 1978 in amounts determined by employer discretion. After the union was certified and while the parties were engaged in bargaining for an initial contract, Litton withheld the increases in February 1981. Relying on *Katz*, the court held that ''[B]ecause employers may not unilaterally change conditions of employment,'' Litton's discontinuance of the February increases without bargaining with the union violated the Act. 949 F.2d at 252–253.

Most significantly, the D.C. Circuit in *Auto Workers (Udylite Corp.) v. NLRB*[21] also extended *Katz* to find unlawful unilaterally discontinued merit raises. The facts of that case are virtually indistinguishable from the instant case. As described by the court in *Auto Workers*, ''[b]efore the Union's certification, the Company had a policy of granting wage increases according to annual merit reviews. This policy was discontinued after certification and during the negotiations. Although an interim plan was agreed upon, certain merit review increases were withheld until the end of the strike,'' which commenced shortly after the interim agreement and continued for 4 more months.[22] Affirming the Board's finding of a violation, the court held:

> Even assuming that increases pursuant to the merit review plan were wholly discretionary, the plan operated according to Company policy, and employees would at least have expected that they would be evaluated according to the plan. Although the Company asserts that it undertook its action in order to comply with *Katz*, compliance with the law required that it consult with the Union prior to suspension of the program. [Id. at 1365.]

Further, despite the court's suggestion in the present case that its decision in *NLRB v. Blevins Popcorn Co.*[23] was too ambiguous to support the broad rule that *Katz* applies to unilateral discontinuances of merit increases, we find that that decision also supports the Board's finding in this case. In finding unlawful the unilateral discontinuance of discretionary merit increases in that case, the court stated:

> Under [these] circumstances, if the company wished to discontinue entirely the practice of granting annual wage increases, it was required to bargain with the union first; *Katz* requires an employer to consult with the union before *changing* an existing condition of employment. [659 F.2d 1189, emphasis added.]

This is precisely what the Board required of the Respondent in the instant case. The only ambiguity in

[18] See also *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214, 217 (5th Cir. 1964) (''there must be an actual change in working conditions'' to establish an 8(a)(5) violation under *Katz*).

[19] 548 F.2d 644 (6th Cir. 1977), enfg. 218 NLRB 1246 (1975).

[20] 949 F.2d 249 (8th Cir. 1991), enfg. 300 NLRB 324 (1990).

[21] 455 F.2d 1357 (1971), enfg. 183 NLRB 163 (1970).

[22] Id. at 1361. For a fuller description of the merit review policy and the circumstances leading to its discontinuance, see 183 NLRB at 170.

[23] 659 F.2d 1173 (D.C. Cir. 1981).

Blevins Popcorn was whether the employer bargained with the union before discontinuing the increases, and as to that factual question the case was remanded to a Special Master. On remand, the Special Master found that the company had failed ''to fulfill the obligation to consult with the Union'' before discontinuing the merit raises.[24] Accordingly, because the ''Company's practice of granting merit increases in December was an existing condition of employment, notwithstanding the discretionary element, [and] could not be unilaterally discontinued without prior consultation with the Union,'' (id. at 2345), the Special Master found the company in civil contempt of an earlier order by the court that it bargain in good faith. The court of appeals affirmed the Special Master. 117 LRRM 2392 (D.C. Cir. 1983).[25]

C. *Discontinued Merit Raises that Constitute a Change in a Term of Employment Have Consistently Been Found Unlawful by the Board under Katz*

Contrary to the court's suggestion, the Board has consistently applied *Katz* to prohibit an employer from unilaterally changing an existing term and condition of employment during bargaining, regardless of whether the change involved a continuance or discontinuance of the existing term.

In accord with this prohibition imposed by *Katz*, the Board sought to explain in its original decision in the instant case what an employer's obligation is when, as here, the existing term of employment involves the annual grant of discretionary merit raises. The Board stated that the same bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases or its unilateral discontinuance of them, reciting the following passage from *Oneita Knitting Mills*,[26] a case, like here, involving an employer who had a practice of annually reviewing employees in order to determine the amount of a merit increase to award:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. [Citing *Katz*.] What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

The court found that our reliance on *Oneita* was misplaced because the violation found therein was the employer's continuance in granting the merit raises, unilaterally, after the union's certification, ''so the decision is clearly not a holding on the present issue.'' 979 F.2d at 1573. The court further noted that although the *Southeastern Michigan*[27] case cited in *Oneita* was similar to the instant case to the extent that it involved an unlawfully discontinued wage increase program, the court found that it too did not support the Board's holding because the discontinued increases in *Southeastern Michigan* were ''*fixed* nondiscretionary raises'' rather than, as here, discretionary increases. Id.

We agree that neither *Oneita* nor *Southeastern Michigan* presents facts precisely congruent with those in this case, but we nevertheless view these cases as instructive and supportive of our original conclusions. Although *Oneita* presents the reverse of the instant situation in that the Respondent here withheld increases while the employer in *Oneita* granted them, a bargaining obligation arose in both instances because a change in employment conditions was effectuated. Further, contrary to the court's suggestion, the duty to bargain is equally applicable in cases like *Southeastern Michigan* where an employer seeks to discontinue fixed *nondiscretionary* wage raises because there, also, the discontinuance produces a change.[28] Again, it is the unilateral change in the terms and conditions of employment that results in the finding of an 8(a)(5) violation, not the type of wage increase that is continued or discontinued.

Accordingly, because the employers' conduct in both *Oneita* and *Southeastern Michigan* constituted a unilateral change in a condition of employment, we believe that both of those cases support the Board's finding of a violation in this case. Similarly, the additional cases earlier cited by the Board in the instant case, i.e., *Central Maine Morning Sentinel*,[29] *Rochester Institute of Technology*,[30] *Allied Products Corp.*,[31] and *General Motors Acceptance Corp.*,[32] are consistent with the Board's finding of an 8(a)(5) finding in this case. Each of these cases involved, as here, an established practice

[24] *NLRB v. Blevins Popcorn Co.*, 117 LRRM 2342, 2345 (S.M. report (1982)).

[25] See also *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1163 (D.C. Cir. 1992), in which this court cited *Blevins Popcorn* in support of the proposition that *Katz* applies to unilateral discontinuances of discretionary merit raises.

[26] 205 NLRB 500 fn. 1 (1973).

[27] *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972).

[28] By contrast, when an employer continues, after a union has been certified, to grant fixed *nondiscretionary* wage increases unilaterally, no 8(a)(5) violation results because there has been no change in the terms and conditions of employment. Rather, in this situation, as *Katz* explained, there is ''in effect . . . a mere continuation of the status quo.'' 369 U.S. at 746.

[29] 295 NLRB 376 (1989).

[30] 264 NLRB 1020 (1982).

[31] 218 NLRB 1246 (1975).

[32] 196 NLRB 137 (1972).

in which unrepresented employees received merit increases that were granted at regular specified periods each year but that were discretionary in amount. And, in each case, the Board applied *Katz* to find that the employers violated the Act by discontinuing those raises during negotiations with the unions that had been newly certified as the employees' collective-bargaining representative.

Contrary to the court, we do not believe that these cases can be meaningfully distinguished on the basis that the range of merit raise discretion exercised by the employers therein was narrower than that exercised by the Respondent. First, we note that accurate comparisons in this regard are possible in only two of the four cited cases, and as to these, we do not find that the discretionary range of the merit raise amounts was significantly different than in this case. Here, the range of discretion was exercised *generally* within a 3- to 5-percent range compared to the 4- to 8.9-percent range in *Central Maine* and the 0- to 13-percent range in *Rochester*.[33] Second, and perhaps most importantly, the discretionary range of the increases here resembled closely the range of discretion of the merit raises which this court found were unlawfully discontinued in *Auto Workers*, supra, i.e., ''generally not in excess of 8 per cent of base salary.''[34] Finally, we are unaware of any precedent or reason that supports the court's suggestion that an employer must operate within a narrow range of discretion in order to find unlawful a unilateral change with respect to merit raises.

We do not regard our recent decisions in *American Packaging Corp*.[35] and *Stone Container Corp*.,[36] or the Board's decision in *American Mirror Co*.,[37] as being contrary to the legal principles discussed above.

In *American Packaging* the employer had for many years prior to the union's 1990 certification granted its employees production-based bonuses every September 1, the amounts of which were determined at the employer's discretion after reviewing the past year's costs and profits. During the course of negotiations for an initial contract, the union advised the employer that it should use the same formula that it had used in the past in calculating the 1990 bonuses, but that if the employer determined that no bonuses were due its nonunion employees under that formula, the union did not expect a bonus to be paid to the union employees. As requested, the employer applied its formula and determined that in light of its worst performance year to date, no production bonuses were earned by any of its employees—union and nonunion. On these facts, the Board found that notwithstanding its failure to pay 1990 bonuses, the employer did not act unlawfully because, in effect, it had not permanently discontinued the bonus program. On the contrary, it bargained with the union, the union waived its right to bargain about the bonus amount to be paid the employees by advising the employer that it should use its established formula in calculating the bonuses, and the employer applied that formula and ''legitimately determined that no year-end bonus was earned for 1990''[38]—a result implicitly contemplated by the union by its agreement to forgo a 1990 bonus if one were not granted to the nonunion employees. Further supporting the conclusion that the bonus program was not unlawfully discontinued was the fact that the employer granted the bonuses the following year.

Similarly, in *Stone Container* the employer did not propose to discontinue permanently the annual April wage increase program that was an established condition of employment in that case, and the Board therein specifically distinguished the instant case on that basis. Rather, following the union's July 1988 certification, the employer acceded to the union's request to bargain about the April 1989 increase and, in response to the union's proposal that ''it would not protest the granting of a wage increase in April'' (id. at 336), the employer undertook its ''annual wage and benefit survey'' (id.) and proposed for economic reasons that it could not give an increase *that April*.[39]

Thus, the critical distinction between the present facts and those operative in *Stone Container* and *American Packaging* is that the latter two employers applied the preexisting system for granting raises while the Respondent did not. The absence of increases in *Stone Container* and *American Packaging* flowed from the employers' application of their merit review program, not, as here, from the Respondent's unilateral decision to withhold raises even if the raises would have been given under an application of the preexisting merit raise program.[40]

American Mirror is factually inapposite here because that case did not concern a merit wage increase program that was a term and condition of employment. Rather, the raises there had been given at random ir-

[33] The court mistakenly stated that *Rochester* was the case where employees received merit raises between 10 and 25 cents per hour. Rather, *Allied Products* was the case where employees received these amounts. However, since it is not known in *Allied Products* what the employees' base wages were, it is not possible to convert into percentages the 10- to 25-cent raises for the purpose of comparing those range amounts with the one at issue here. For essentially the same reason, a similar comparison is impossible with respect to the discontinued $30-merit raises in *General Motors*.

[34] *Udylite Corp*., 183 NLRB 163, 170 (1970), enfd. sub nom. *Auto Workers v. NLRB*, 455 F.2d 1357 (D.C. Cir. 1971).

[35] 311 NLRB 482 (1993).

[36] 313 NLRB 336 (1993).

[37] 269 NLRB 1091 (1984).

[38] 311 NLRB at 483.

[39] The trend of the April wage increase had been progressively downward from 6 percent when first given in 1984 to 2 percent when last given in 1988.

[40] Unlike our concurring colleagues, we find it unnecessary in this case to address the Board's discussion in *Stone Container* of *Bottom Line Enterprises*, 302 NLRB 373 (1991).

regular intervals in the past and, hence, the employer's withholding of them did not constitute a change, as here, in a clearly established pattern that had become a term of employment. See, e.g., *Postal Service*, 261 NLRB 505 (1982); *Ithaca Journal-News*, 259 NLRB 394 (1981).

Finally, the Board in its first decision in this case distinguished *Anaconda Ericcson Inc.*[41] on the basis that the amounts of the raises therein were discretionary, the parties during negotiations had begun bargaining over wages, and the union did not unconditionally agree to the wage increase. The court found this attempted distinction by the Board ''cursory'' and that ''[n]one of these three factors seems to explain the different outcomes'' in the two cases. 979 F.2d at 1575.

Upon reconsideration, we agree with the court that it is not possible to reconcile the Board's decision in *Anaconda Ericcson* with the Board's other decisions in this area, discussed above. The December 1 wage increase in *Anaconda* was a term and condition of employment, and the employer was obligated to bargain with the union over the amount of the increase. The union's proposal of an 85-cent increase and the employer's counterproposal of a 5-cent increase did not, as the court noted in its decision, constitute an impasse in bargaining or a waiver of the union's right to bargain. In no event was the employer privileged to decide unilaterally to withhold a wage increase from its employees altogether as it did. Accordingly, we overrule *Anaconda* to the extent that the decision addresses the unilateral discontinuance of merit increases.

II. THE ECONOMIC DEFENSE AND THE REMEDY

In addition to the *Katz* issue, the court invited the Board on remand to address two additional issues not raised by the parties but having ''an obvious bearing on the internal logic of the Board's policy.'' 979 F.2d at 1576. The first issue deals with the court's concern as to how the Board can devise an acceptable remedy, assuming a violation here, that makes employees whole for the loss of a wage increase that is based on employer discretion. The second issue posed by the court is whether the unilateral discontinuance of the merit wages should be regarded as a lawful economic bargaining weapon.

A. *Fashioning an Appropriate Remedy in this Case is Feasible*

Pursuant to the Board's established and court-approved policy, ''in cases, like here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is [customary] to order restoration of the *status quo ante* to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the respondent.''[42] Such a remedy in the form of a reimbursement order for lost wages is warranted to ''prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining undue advantage at the bargaining table when he bargains about the benefits which he has already discontinued.''[43]

To remedy the violation found in this case, the Board applied these policy considerations by ordering that the employees be paid the ''difference between their actual wages and the wages they would have otherwise received'' if the merit increases had not been unilaterally discontinued. The court, however, questioned how the Board proposed to enforce its order since, inasmuch as the amounts of the withheld merit raises were determined by employer discretion, determining the amounts of the withheld wage increases that are based on discretion is ''unascertainable.'' 979 F.2d at 1577.

We do not share the court's pessimism. The court's hypothesis is based on the premise that if a backpay award cannot be determined with precision, one should not be awarded. We disagree. A ''backpay award is only an approximation, necessitated by the employer's wrongful conduct.''[44] Therefore, the ''Board is required only to adopt a formula which will give a close approximation of the amount due . . .; it need not find the exact amount due.''[45]

Contrary to the court, we find that the Board's remedial order will enable a backpay award to be ascertained for each employee affected by the Respondent's unlawful conduct. Thus, it will be recalled that although the Respondent discontinued granting merit increases to the editorial employees at issue here, it continued to issue annual merit reviews to them and to all its unrepresented employees. Pursuant to those reviews, the Respondent also continued to grant merit increases to its unrepresented employees. This information, along with other factors, such as the amounts of the merit increases awarded to the editorial employees during the years prior to their discontinuance, should be sufficient to enable the General Counsel at the compliance proceeding to construct a formula which will give a close approximation of the amount due. See, e.g., *Overseas Motors*, supra at 520.[46]

[41] 261 NLRB 831 (1982).

[42] *Allied Products Corp.*, 218 NLRB at 1246 (1975), enfd. 548 F.2d 644 (6th Cir. 1977). See also *NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916, 919 (7th Cir. 1963), and cases cited therein.

[43] *John Zink Co.*, 196 NLRB 942 (1972); *Herman Sausage Co.*, 122 NLRB 168, 172 (1958), enfg. 275 F.2d 229 (5th Cir. 1960).

[44] *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

[45] *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir. 1987), citing *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963).

[46] See also *NLRB v. Iron Workers Local 433*, 660 F.2d 770 (9th Cir. 1979).

B. *Unilateral Conduct is not a Permissible Economic Weapon for Bargaining*

The second issue which the Board was invited to consider on remand is whether the unilateral discontinuance of the merit wages should be regarded as a lawful economic bargaining weapon in the same sense that the ''harassing tactics'' employed in *NLRB v. Insurance Agents' International Union (Prudential Insurance Co.)*[47] and the lockout invoked in *American Ship Building Co. v. NLRB*[48] were found to be lawful economic weapons. For the reasons set forth below, we conclude that such unilateral action is not a lawful economic weapon.

The court in the instant case noted that in *Lane v. NLRB*[49] it applied *American Ship* to find that a preimpasse lockout does not violate Section 8(a)(3) as long as it satisfied the standard set forth in *NLRB v. Great Dane Trailers*,[50] i.e., the employer is not motivated by union animus and the lockout has both a ''legitimate and substantial business justification'' having an impact on employees which is only ''comparatively slight.'' The court reasoned, therefore, that if, as in *Lane*, a preimpasse lockout can be lawful under the test of *Great Dane*, ''it makes no sense to have a *per se* ban on decreasing wages or benefits, which is clearly a less drastic economic weapon [and s]uch a policy defies not only logic but also the . . . admonition in *Insurance Agents'* not to distinguish a 'greater' economic weapon, such as a strike or lockout, from a 'lesser' economic weapon.'' 979 F.2d at 1577.

It must be remembered, however, that the balancing test of *Great Dane* applies only to analyzing whether Section 8(a)(3) has been violated. Therefore, if a lockout and a unilateral decrease in wages or benefits were subjected to the balancing test of *Great Dane*, and even assuming, arguendo, that a unilateral decrease in wages and benefits is a less drastic economic weapon than a lockout, then, perhaps, it might make no sense to have a per se ban only on the former.[51] But in the instant case we are concerned only with whether the Respondent's unilateral action violated Section 8(a)(5), a violation of which does not turn on antiunion motivation or on any of the factors weighed under *Great Dane*'s balancing test in determining whether Section 8(a)(3) has been violated.[52] Rather, the question under Section 8(a)(5) simply is whether an employer has refused to bargain in good faith, and *Katz* has stated emphatically that it has not bargained in good faith when, as here, it acts unilaterally with respect to terms and conditions of work.

The Supreme Court decisions in *Insurance Agents* and *American Ship* confirmed the principle that although an employer and a union are both obligated under the Act to bargain in good faith, both parties may, without violating their duty to bargain, exert economic pressure on each other in an effort to secure agreement to each others' bargaining proposals. In *Insurance Agents*, economic pressure took the form of half-day walkouts and refusals by employees to perform various job duties. The Court, reversing the Board's finding that the union's tactics constituted bad-faith bargaining under Section 8(b)(3), explained that during negotiations for a collective-bargaining agreement the ''presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the . . . Act [ ] ha[s] recognized.'' 361 U.S. at 489. The Board was admonished that the authority granted it by Congress to enforce the statutory requirement that parties bargain in good faith did not include the power to outlaw the various forms of economic weaponry that the parties to the bargaining might summon to their aid.

This reasoning was applied subsequently by the Court in *American Ship* in assessing the legality of a postimpasse lockout as an economic weapon in support of an employer's bargaining position. The Board found that the lockout violated Section 8(a)(3) and (1) because it interfered with and discriminated against employees in the exercise of their protected right to bargain collectively. The Court reversed, finding no such interference with or discrimination against the employees' bargaining rights, and again, citing *Insurance Agents*, scolded the Board for improperly injecting itself into the bargaining process ''to deny weapons to one party or the other because of its assessment of that party's bargaining power.'' 380 U.S. at 308. Although there was no issue involving Section 8(a)(5) in *American Ship*, the Court stated in dicta that its holding in *Insurance Agents* had ''even more direct application to the Section 8(a)(5) question'' than it did to the 8(a)(3) question in *American Ship*.

Thus, while the Supreme Court has made clear in *American Ship* and *Insurance Agents* that the Board is not warranted in becoming involved in the substantive

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[47] 361 U.S. 477 (1960).

[48] 380 U.S. 300 (1965).

[49] 418 F.2d 1208, 1212 (D.C. Cir. 1969).

[50] 388 U.S. 26 (1967).

[51] The Second Circuit, however, would disagree. In language that can be fairly described as holding that it is a per se violation of Sec. 8(a)(3) to unilaterally decrease wages and benefits, the court stated that, if such conduct was permitted

> an employer would appear to be entitled, in the hope of improving his bargaining position, to alter all conditions of employment after union certification, reducing wages to the legal minimum and allowing the work environment to deteriorate. The devastating impact that such action would have upon employee exercise of Section 7 rights is indisputable. While the business purpose would be ''substantial,'' we could not characterize it as ''legitimate.'' [*NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1110 (2d Cir. 1973).]

[52] See *U.S. Gypsum*, 284 NLRB 4, 13 (1987) (the ''applicable cases hold that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5)'').

aspect of the bargaining process by ''functioning as an arbiter of the sort of economic weapons the parties may use in seeking acceptance of their bargaining demands,''[53] it is also clear that not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position. This point was emphasized in *Katz* where the Court was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining. Thus, while recalling that in *Insurance Agents* it found that the Board may not decide the legitimacy of economic pressure tactics ''in support of genuine negotiations,'' *Katz* made clear that the Board ''*is* authorized to order the cessation of behavior which is in effect a refusal to negotiate.'' 369 U.S. at 747. The Court emphasized that in dismissing the refusal-to-bargain allegation in *Insurance Agents*, the union therein, unlike the employer in *Katz*, ''had not in any way foreclosed discussion of any issue, by unilateral actions or otherwise.'' Id.[54]

Similarly, in upholding the legality of the lockout as an economic weapon in *American Ship*, the Court thought it important to stress the employer's ''legitimate bargaining position'' (380 U.S. at 310) and to observe that there was ''no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining,'' thus specifically distinguishing cases ''where the Board has concluded on the basis of substantial evidence that an employer has used a lockout as a means . . . to evade his duty to bargain collectively.'' (Id. at 308.) Accordingly, the Court concluded that use of the lockout was not ''inconsistent with the right to bargain collectively'' (id. at 310) because the sole purpose of its use was ''merely to bring about a settlement of a labor dispute on favorable terms.'' (Id. at 313.)

Thus, since the Respondent's unilateral action in this case was ''inconsistent with the right to bargain collectively'' under Section 8(a)(5), such action is not privileged under a *Great Dane* analysis and such analysis is unwarranted.

The court invited the Board also to consider Professor Gorman's observation that in two similar cases where the Board and this court found violations for the denial of economic benefits during bargaining,[55] the ''tribunal[s] . . . [may have] engag[ed] in the kind of 'picking and choosing' among allowable economic weapons for which the Board was reprimanded in [*Insurance Agents* and *American Ship Building*].'' 979 F.2d 1578, quoting Robert A. Gorman, Basic Text on Labor Law 434 (1976).

Contrary to Professor Gorman's suggestion, the Board and court decisions in *Borden* and *Molders Local 155* represent a straightforward application of *Katz*. The judge in *Borden* specifically rejected the employer's contention that an *American Ship* analysis should be applied in deciding whether the employer's unilateral cancellation of its employee insurance benefit program violated Section 8(a)(5). Similarly, in *Molders Local 155*, the court, having found that the employer's unilateral withdrawal of fringe benefits and wage increases for the admitted purpose of inducing employees to strike in violation of Section 8(a)(3), found that it necessarily followed that the unilateral action also violated Section 8(a)(5) and, therefore, concluded that ''[u]nlike the situation in *Insurance Agents'*, then, there was in the present case 'some specific warrant for [the Board's] condemnation of the precise tactics involved here.''' 442 F.2d at 748.

Conclusion

For the foregoing reasons, we conclude that the finding of a violation in this case is based on a reasonable interpretation of *Katz* and, therefore, we affirm the Board's original decision.

ORDER

The National Labor Relations Board reaffirms the Board's original Order reported at 304 NLRB 511 (1991), and orders that the Respondent, The Daily News of Los Angeles, a Division of Cooke Media Group, Inc., Woodland Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBERS STEPHENS AND COHEN, concurring.

We join in the opinion for the majority except that we do not fully subscribe to the reasoning in the discussion concerning the bargaining obligation of an employer regarding a past practice that is scheduled to recur during negotiations for a contract. We write separately to state our views on the subject.

Where there is a past practice concerning an annual event (e.g., an annual wage increase), and the event is scheduled to recur during negotiations for a contract, the employer satisfies its bargaining obligation if it gives reasonable advance notice and opportunity to

[53] *American Ship*, 380 U.S. at 317, quoting from *Insurance Agents*, 361 U.S. at 497.

[54] A number of writers on this issue have also noted that in *American Ship* and *Insurance Agents* the Supreme Court adopted a long held academic view that the Board should not attempt to determine what economic tactics should be used in negotiations as long as the parties are otherwise engaged in a lawful effort to reach an agreement. See, e.g., George Schatzki, *The Employer's Unilateral Act—A Per Se Violation Sometimes*, 44 Tex. L. Rev. at 485 (1966); Walter E. Oberer, *Lockouts and the Law: The Impact of American Ship and Brown Food*, 51 Cornell L.Q. 193 (1966); William B. Gould IV, *A Primer on American Labor Law* 100–103 (3d ed. 1993).

[55] *Borden, Inc.*, 196 NLRB 1170 (1972), and *Molders Local 155 v. NLRB*, 442 F.2d 742, 748 (D.C. Cir. 1971).

bargain about that scheduled event.[1] Assuming that the employer gives such notice and opportunity, it can implement its final proposal as to that matter even if the parties have not reached impasse, either overall or on the specific matter.[2] In essence, the time for the scheduled event arrives before the parties have reached impasse. In such circumstances, we would permit the employer to act ''on schedule,'' so long as there has been a reasonable notice and opportunity for bargaining.[3]

On the other hand, if the employer's proposal is for a permanent change in the practice, i.e., a change that would operate in the current year and in future years, the employer cannot make the permanent change (so as to affect future years) until an impasse has been reached.

In the instant case, the Respondent changed the practice for the current year without reasonable notice and opportunity to bargain. In addition, the Respondent made a permanent change, affecting future years, without reaching an impasse. Accordingly, under the tests set forth above, we conclude that the Respondent's conduct was unlawful.

[1] See *Stone Container*, 313 NLRB 336 (1993). The employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year.

[2] Of course, absent impasse, the employer may have to continue bargaining after implementation, and such bargaining could include demands for retroactive application of any agreement ultimately reached.

[3] We agree with our colleagues that the employer in *Anaconda Ericcson*, 261 NLRB 831 (1982), violated the Act, but our conclusion rests solely on the fact that the implemented increase there differed from the final offer.